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No. 02-545

In the Supreme Court of the United States

SUSAN CHANDLER, DIRECTOR OF HUMAN SERVICES AND HAWAII, PETITIONERS

v.

RICHARD K. LOVELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' sovereign immunity against private suits for damages.

2. Whether the State of Hawaii, by accepting federal funds for its Department of Human Services, waived its sovereign immunity against private suits for damages for violation of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a).

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OPINIONS BELOW

The opinion of the court of appeals in the cases brought by respondents Lovell and Delmendo (Pet. App. 1a-33a) is reported at 303 F.3d 1039. The opinions of the court of appeals in the cases brought by respondents Hirata and Lum Ho (Pet. App. 34a-37a) are not reported. The opinions and judgments of the district court in each case (Pet. App. 38a-55a, 58a-68a, 72a-73a) are not reported.

JURISDICTION

The court of appeals entered its judgment on September 5, 2002. The petition for a writ of certiorari was

filed on October 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

By its terms, the Disabilities Act's prohibitions on discrimination are enforceable against public entities through private suits. See, *e.g.*, 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individ-

ual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

b. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *Olmstead*, 527 U.S. at 590 n.4.

In 1985, this Court held that Section 504's text was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.

> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

2. In November 1995, Shea Burns-Vidlak, a minor with a disability, and George Cohn, a blind adult, filed suit against petitioners under Title II of the Disabilities Act and Section 504 of the Rehabilitation Act to challenge the exclusion of certain individuals with disabilities from participation in a state health insurance program, known as QUEST. Pet. App. 6a. State law categorically excludes from participation in QUEST those "[p]ersons who are blind or disabled according to the criteria employed by the Social Security Administration," Haw. Admin. R. § 17-1727-13(2) (1994). See Pet. App. 4a-5a.

The district court granted partial summary judgment against the petitioners, concluding that the exclusionary criteria violated both Title II and Section 504. *Burns-Vidlak* v. *Chandler*, 939 F. Supp. 765, 769-773 (D. Haw. 1996); see also Pet. App. 2a, 7a. The district court ordered further proceedings to determine whether petitioners were liable for punitive damages, and those proceedings remain pending in district court.

Two months after entering its partial summary judgment order, the district court certified a class of individuals "for the already decided question of general liability for compensatory damages, and for the undecided question of the State's liability for punitive damages." Pet. App. 7a-8a. The district court then directed the individual class members to file independent law-

suits to determine their individual entitlement to damages. *Id.* at 2a-3a, 6a-7a.

More than 300 persons subsequently filed individual actions for compensatory damages, including respondents. In those individual actions, the district court did not permit petitioners to contest the *Burns-Vidlak* liability determination. Pet. App. 20a n.7 After a bench trial, respondents each were awarded compensatory damages. Pet. App. 3a, 8a-9a, 54a, 67a. The district court certified its damages awards as final judgments under Federal Rule of Civil Procedure 54(b).

3. The court of appeals affirmed. Pet. App. 1a-33a. The court first rejected petitioners' argument that the court lacked jurisdiction over the appeal. *Id.* at 9a-14a. Petitioners argued that they filed the appeal only "in an abundance of caution," *id.* at 9a, and that, in fact, there was no final judgment for the court to review because the partial summary judgment entered in *Burns-Vidlak*, which established petitioners' liability on the merits, was not yet final. The court of appeals rejected that argument, concluding that the "unique procedural posture" of the case, *id.* at 10a, did not require the Court to await the conclusion of proceedings in the class action before reviewing the award of damages in the individual cases before it. In so holding, the court acknowledged that "we will need, in effect, to review the merits of the partial grant of summary judgment in *Burns-Vidlak* in order to decide the current appeals," *id.* at 11a.

On the merits, the court of appeals held (Pet. App. 14a-18a) that the damages awards were not barred by the Eleventh Amendment. Relying on prior circuit precedent, the Court held (*id.* at 15a-16a) that Congress validly abrogated the States' sovereign immunity for claims under Title II of the Disabilities Act and that, by

accepting federal funds conditioned on a waiver of sovereign immunity, the State had waived its immunity to claims under Section 504. The Court further held (*id.* at 17a) that, under the Spending Clause, Congress validly conditioned receipt of federal funds on a waiver of immunity. See also *id.* at 34a-37a (judgments in favor of respondents Lum Ho and Hirata summarily affirmed in light of the decision in Lovell's and Delmondo's appeal).

ARGUMENT

1. On November 18, 2002, this Court granted certiorari in *California Medical Board* v. *Hason*, No. 02-479, to address the question whether Title II of the Americans with Disabilities Act of 1990 is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' sovereign immunity against private suits for damages. Because the first question presented in this case raises that same question, the Court may wish to hold the petition pending the Court's decision in *Hason*.

There are, however, four reasons why this case does not merit an exercise of this Court's certiorari jurisdiction and why, accordingly, the Court could deny this petition notwithstanding the pendency of *Hason*.

First, although petitioners now assert that there are no jurisdictional or prudential barriers to review in this case, Pet. 17 n.10, petitioners argued otherwise before the court of appeals. Petitioners argued that the court of appeals lacked jurisdiction because no final judgment had been entered in the underlying litigation establishing liability. Pet. App. 9a-13a. Indeed, petitioners explained that the appeal, for which they now seek this Court's review, was only filed out of "an abundance of caution." *Id.* at 9a.

Petitioners' previously expressed concerns that the "unique procedural posture" (Pet. App. 10a) of this case raises potentially significant jurisdictional and prudential barriers to review of the questions presented have merit. The district court's unusual handling of this litigation put the cart before the horse in the court of appeals. As petitioners' jurisdictional argument below explained, the present case involves an appeal of a damages judgment. But the indispensable predicate for that damages award—the liability judgment entered in the separate *Burns-Vidlak* litigation—is not a final judgment. At the time the court of appeals acted and at present, that case remains pending.[1]

The fact that the critical liability predicate for the present judgment remains non-final counsels strongly against an exercise of the Court's certiorari jurisdiction in this case. The basis for the court of appeals' rejection of petitioners' jurisdictional arguments is unclear. The court stated that the district court "incorporated by reference the reasoning and result of the *Burns-Vidlak*" class action opinion, rather than treating the appeals as involving further proceedings in the class action case. Pet. App. 12a. But, at the same time, the court of appeals noted (*id.* at 20a n.7) that the district court in the instant case (and all the individual cases) failed to grant the State's motion that it be permitted to contest the liability determination made in the class action, and instead "relied on * * * the *Burns-Vidlak* finding of unlawful discrimination." That determination cannot be readily reconciled with the court of appeals' conclusion that the individual actions were jurisdictionally independent. The court of appeals left entirely

[1] The docket reveals that the plaintiffs recently filed a "request for entry of final judgment."

unexplained how it could review by incorporation and affirm a liability judgment that the State was *not* permitted to contest in the trial court.

In addition, the court of appeals' supposition that the cases were jurisdictionally independent cannot be reconciled with the district court's certification of its judgment in each of respondents' cases under Federal Rule of Civil Procedure 54(b). See Pet. App. 9a. The only unresolved "rights and liabilities," Fed. R. Civ. P. 54(b), that could support such a certification are the issues pending in the *Burns-Vidlak* litigation.

That tangled procedural posture raises the possibility that the current judgment is not a final judgment in an Article III case or controversy, but rather an advisory opinion on the amount of damages that would be appropriate if the liability finding in a separate action is ultimately vindicated. In any case, whether the judgments in this case represent independent, final judgments or the partial implementation of non-final class action proceedings poses a novel jurisdictional question that this Court would have to decide before reaching the constitutional questions presented.

Furthermore, because the judgment is not yet final, the district court could alter or amend its judgment in the *Burns-Vidlak* litigation in a relevant manner for a variety of reasons, such as clarifying (in light of the pendency of *Hason*, for example) that the liability determination rests independently on Section 504 of the Rehabilitation Act. Indeed, it is the prospect of such changes rendering appellate review premature or advisory that in large part animates the final judgment rule. In this case, any subsequent changes could result in the Court's disposing of an important constitutional question on the basis of an incorporated, non-final liability judgment, even though the predicate for that

interim liability judgment ultimately could be eroded by subsequent proceedings in the original litigation.

Second, prudential reasons further counsel against indirectly reviewing the incorporated *Burns-Vidlak* liability determination because the State of Hawaii appears to have waived any Eleventh-Amendment based challenge to the abrogation provisions in the *Burns-Vidlak* case. See Pet. 6 n.5. While petitioners assert that the waiver was made before *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), and was only made on behalf of Hawaii and not the government official sued in her official capacity (Pet. 6 n.5), three years *after Seminole Tribe* and in an appeal involving both the State of Hawaii and Director Chandler, petitioners left the Ninth Circuit with no doubt that they had abandoned their Eleventh Amendment immunity argument. "In the instant case," the court of appeals explained, "the State is not claiming sovereign immunity from suit in federal court. In fact, the state concedes that it is subject to suit, and answerable in money damages, in federal court on the appellees' Title II and Section 504 claims." *Burns-Vidlak* v. *Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999).[2] In light of petitioners' argument to the court of appeals in this case (Pet. App. 9a-13a) that the liability judgment was not final or reviewable until the *Burns-Vidlak* litigation concluded,

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[2] Petitioners cannot suggest that they were still unaware of their potential Eleventh Amendment defense under Title II in 1999. That is because, in early 1998, Hawaii joined an amicus brief in this Court arguing that *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), made it "doubtful" that Congress could have validly abrogated the States' Eleventh Amendment immunity to suits under Title II of the Disabilities Act. Brief of Amici Curiae State of Nevada et al. at 10-11, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206 (1998) (No. 97-634).

and thus that the liability judgment should be reviewed instead in the case where Eleventh Amendment immunity was "not claim[ed]," 165 F.3d at 1260, prudential considerations counsel against reviewing the Eleventh Amendment immunity question here. That is, in part, because consideration of the constitutional questions presented would be diverted by litigation over whether and how the court of appeals' incorporation of the class-action liability judgment, in which the sovereign immunity defense was not asserted and liability for damages was conceded for the class, affected petitioners' ability to assert the immunity as to individual class members. Cf. *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640 (2002).

Third, not only is the liability determination in the underlying class action non-final, but the propriety of certifying the class is part of that pending non-final judgment. The question of whether district courts may appropriately certify a class action *after* a liability determination has been rendered, and then immediately direct every class member to file *individual* actions is, to say the least, open to question. If either the district court reconsiders before entering final judgment or the court of appeals on later review rules that class certification was improper, the very foundation for the present litigation would crumble. The liability predicate for the damages judgment would disappear. In addition, there is a serious question whether the district court could automatically incorporate the liability determination entered in an action between the State and two private parties into a case involving the State and different private parties, without allowing the State to defend against the liability judgment in the latter case. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 162 (1984)

(federal government, unlike private litigants, is not subject to nonmutual offensive collateral estoppel).

Fourth, a ruling on the abrogation of immunity for Title II of the Disabilities Act would have no effect at all on petitioners' liability in this case. The relief awarded is independently supported by Section 504 of the Rehabilitation Act. As the court of appeals noted (Pet. App. 27a), the "same remedies are available for violations of Title II of the ADA and § 504." See 42 U.S.C. 12133 (providing that the remedies under Section 504 "shall be the remedies * * * this subchapter provides to any person alleging discrimination on the basis of disability in violation of" Title II of the ADA). Petitioners receive funds making them liable under Section 504, and the liability determination underlying the case (which, again, is an incorporated non-final determination from a different case that the State was not allowed to contest in this case) was premised on both Title II and Section 504. This Court should not exercise its certiorari jurisdiction for the purpose of granting ineffectual relief.

In sum, this case is in an interlocutory and procedurally confused posture such that it would not warrant an exercise of this Court's certiorari jurisdiction in its own right, especially since a grant of certiorari would be of no practical value to the petitioners. Accordingly, the Court could conclude that holding the case for *Hason* is not warranted.

2. Regardless of whether the first question is held for *Hason* and regardless of how *Hason* is resolved, the Court should deny certiorari on the second question presented by the petition. The court of appeals correctly held that Congress validly conditioned receipt of federal funds on a waiver of immunity to claims under Section 504 of the Rehabilitation Act. That holding

does not raise a significant or sustained conflict with any decision of any other court of appeals. Indeed, this Court recently denied a petition for a writ of certiorari on that same question in *Ohio Environmental Protection Agency* v. *Nihiser*, 122 S. Ct. 2588 (2002) (No. 01-1357).

a. The Rehabilitation Act expressly provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. 2000d-7(a). Petitioners do not dispute (Pet. 20) that Congress has the power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999). Nor do petitioners contend that the language of Section 2000d-7 failed to put them on clear notice that acceptance of federal funds would constitute a waiver of immunity to suit under Section 504.[3]

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[3] The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), petition for cert. pending, No. 02-801 (filed Nov. 19, 2002); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied,

Instead, petitioners argue (Pet. 21-22) that their waiver of immunity to suits under Section 504 was not "knowing" because Congress had also abrogated the States' immunity from suit under a different law—Title II of the Disabilities Act, 42 U.S.C. 12131 *et seq.* Petitioners rely on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001), which held that the State's acceptance of clearly-conditioned funds "alone is not sufficient" to waive immunity, *id.* at 113-114; the question is whether the State "believed" the waiver would have any practical impact, *id.* at 115 n.5. The Court then reasoned that, because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, * * * since by all reasonable appearances state sovereign immunity had already been lost." *Id.* at 114 (citation omitted).

That argument does not merit further review. *Garcia* predated this Court's decision in *Lapides* v. *Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002), in which this Court held that a State's waiver of immunity turns upon its objective conduct (there, of removing a case to federal court), even though the State did not believe at the time it engaged in that conduct that it would result in a waiver of immunity. See 122 S. Ct. at 1645-1646. In so holding, this Court specifically refused to make the unequivocal waiver question turn upon the State's subjective beliefs. *Id.* at 1644-1645. "Motives are difficult to evalu-

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122 S. Ct. 2591 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

ate," the Court explained, "while jurisdictional rules should be clear." *Id.* at 1645. *Lapides* casts such substantial doubt on *Garcia* that review of the *Garcia* rationale in this case, before the Second Circuit has reconsidered its position in light of *Lapides*, would be premature.

b. Petitioners further contend (Pet. 24-27) that Section 2000d-7's waiver of immunity does not extend to damages. Petitioners did not raise this argument below, it was not addressed by the court of appeals, and petitioners did not seek further review through a petition for rehearing. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994).

Moreover, despite their contention (Pet. 24-26) that their claim follows directly from *Lane* v. *Peña*, 518 U.S. 187 (1996), petitioners have not pointed to any decision by any court in the last six years that has adopted the claim that they now press. Review by this Court of a new claim that no court of appeals, including the court below, has ruled upon or even discussed would be premature.

In any event, petitioners' argument is wrong. The Eleventh Amendment is an immunity from suit for any form of relief, equitable or legal. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 58 (1996). By waiving their "Eleventh Amendment" immunity, petitioners necessarily waived their immunity to suit for any form of relief. Just as a sue-and-be-sued clause deprives a federal entity of any remnant of its sovereign immunity to damage actions, see *FDIC* v. *Meyer*, 510 U.S. 471, 480 (1994), Section 2000d-7(a)(1)'s unqualified abroga-

tion of sovereign immunity subjects the States that accept federal funds to such traditional judicial remedies as compensatory damages.

Section 2000d-7(a)(2) (see Pet. 25-26) does not help petitioners. That Section provides:

> In a suit against a State for a violation of [Section 504 and other specified civil rights statutes], remedies (including remedies both at law and in equity), are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

As the caption of Section 2000d-7 ("Civil rights remedies equalization") indicates, Section 2000d-7(a)(2) is intended to "equaliz[e]" the "remedies" available against a state defendant. That Section is not a response to sovereign immunity (which is entirely removed by subsection (a)(1)), but to the myriad other rules apart from the Eleventh Amendment that reflect the special status of States (but not other public and private entities) in the federal system. See, *e.g*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). Congress enacted that subsection to eliminate any possibility that those other rules might limit the remedies available against States even when sovereign immunity was removed. Cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (common law presumption against punitive damage awards against governmental entities).

Moreover, Section 2000d-7(a)(2) provides that a plaintiff may recover "remedies both at law and in equity" against a State "to the same extent as such

remedies are available for such a violation in the suit against *any* public or private entity other than a State" (emphasis added). It is well-established that damages are generally available against all private entities and most public entities (such as cities and school districts). See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100-2101 (2002). And *Lane* made clear that the federal government could be sued for damages for violations of Section 504 when it was sued for its actions as a "provider" of federal funds. See 518 U.S. at 193. Therefore, damages *are* available against every public entity, both federal and local, in at least some circumstances, and are therefore available against the States.

Beyond that, petitioners' contention that their Eleventh Amendment immunity is removed by Section 2000d-7, but that no damages are available, would render the statute a practical nullity. *Ex parte Young*, 209 U.S. 123 (1908), already permits suits against state officials for prospective injunctive relief.

c. Finally, petitioners urge (Pet. 27-29) this Court to review whether there is a private right of action against state recipients of federal financial assistance for violations of Section 504. That argument also was not pressed by petitioners below or addressed by the court of appeals. Nor have petitioners pointed to any decision of any court of appeals that has addressed the issue. Review in this case therefore is not warranted.

In any event, Congress has made plain in the text and structure of the relevant statutes its intent to provide a private right of action against recipients of federal funds, including state recipients, for violations of Section 504. This Court has consistently held that Section 2000d-7 "ratified *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)]'s holding" that a private right of action exists for the statutes identified therein.

Alexander v. *Sandoval*, 532 U.S. 275, 280 (2001); see *Barnes*, 122 S. Ct. at 2100; *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992); *id.* at 78 (Scalia, J., concurring).

Furthermore, Section 2000d-7 does not stand alone. In 1978, Congress enacted Section 505(a)(2) of the Rehabilitation Act, which provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. 794a(a)(2). Just last Term, this Court made clear that, based on Section 505(a)(2), "[b]oth [Section 504 of the Rehabilitation Act and Title II of the Disabilities Act] are enforceable through private causes of action" as evidenced by the incorporation of "the remedies available in a private cause of action brought under Title VI." *Barnes*, 122 S. Ct. at 2100.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the first question presented should be held pending this Court's decision in *California Medical Board* v. *Hason*, No. 02-479.

Respectfully submitted.

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